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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 255.

THE CITIES OF CANTON, CLEVELAND, and MASSILLON, OHIO,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO, and THE EAST OHIO GAS COMPANY,

Respondents.

REPLY BRIEF BY THE PETITIONERS.

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RESTATEMENT OF THE CASE.

The East Ohio Gas Company has tried to complicate the very simple issue presented in our petition by stating many irrelevant facts sprinkled with an assortment of partial truths. It is true that this was a very long and complicated case. It had to be. This case involved the valuation of an enormous array of property on a present-day basis.

Out of all the issues involved in this case the petitioners ask this Court to consider only one: *Are ratepayers entitled to due process of law in the setting of rates by state regulatory bodies?* This rather simple issue is based upon only a few facts:

1. The Public Utilities Commission of Ohio (hereinafter referred to as the "Commission") adopted a property valuation of The East Ohio Gas Company which was attributed to a Mr. Paul Hampton.

2. The valuation adopted by the Commission was the result of many engineering judgments by Mr. Hampton.

3. The phantom Mr. Hampton neither gave any direct testimony nor was made available for cross-examination.

4. The Commission utilized the valuation in question as the basis for increasing the rates of The East Ohio Gas Company (hereinafter referred to as the "Company").

The Commission Adopted Hampton's Valuation.

The Commission has clearly adopted the valuation attributed to Mr. Hampton. On page 20 of the Commission's decision (Cities' Petition, App. A, page 45) the Commission very clearly shows that, except for one minor adjustment, it adopted the valuation contained in Commission Exhibit 4 as shown below:

"COMMISSION'S EXHIBIT 4.

	R. C. N.	Existing Depreciation	R. C. N. D.
	$496,031,897	$99,800,080	$396,231,817
Adjustment	454,491	71,716	382,775
	$495,577,406	$99,728,364	$395,849,042

The Commission finds the reproduction cost new less existing depreciation to be $395,849,042."

Commission Exhibit 4 is in turn an abstract of the valuations contained in Exhibit II-A (Tr. 9049). Exhibit II-A is the engineering section of the staff report which has been attributed to a Mr. Hampton (Tr. 9028). *The Commission* (except for one relatively minor adjustment) as indicated above *has adopted dollar for dollar the valuation*

attributed to Mr. Hampton. The implications to the contrary are a deliberate attempt to cloud the issues.

The Valuation Adopted by the Commission Is Based Upon Many Engineering Judgments.

Just about every conceivable kind of property is involved in this case: meters, record players, vehicles, ping pong tables, 60,000,000 feet of varying sizes and kinds of pipe, beds, percolators, gas-masks, sand urns, tools, practically every kind of electronic equipment, etc. It should be self-evident that an enormous number of judgments would be involved in valuing such property on the basis employed in this case: reproduction cost new less existing depreciation. Pages 5 through 7 of our Petition contain numerous citations from the transcript illustrating the fact that the valuation adopted by the Commission was completely dependent upon many engineering judgments by Hampton.

Hampton Is a Complete Stranger to the Record of This Case.

Canton, Cleveland, and Massillon, stated in their Petition (page 4 et seq.) that Mr. Hampton neither gave any direct testimony nor was made available for cross-examination. *Neither one of the respondents could point* in their briefs to a single place in the record *where Mr. Hampton either gave any direct testimony or was made available for cross-examination.*

The petitioners throughout the proceedings made it known that they wished to cross-examine whoever prepared the valuations adopted by the Commission. Early in the proceedings the petitioners through the Law Director of Cleveland made it very clear that they would

object to the introduction of the Staff Report unless those who prepared it were made available for cross-examination (Tr. 1028—contained on page 59 of the petitioners reply brief before the Supreme Court of Ohio). As shown on pages 9-11 of our petition, we objected to the admission into evidence of both the "Engineering Report" of the Staff Report and the workpapers attributed to Mr. Hampton (Tr. 9643-50). The petitioners also objected to Commission Exhibit 4 (Tr. 9643-50), which, as previously shown, is nothing more than an abstract from the Staff Report.

The Commission Utilized the Hampton Valuation as Its Justification For Increasing the Company's Rates.

As previously shown the Commission adopted the Hampton valuation of $396,231,817 and after an adjustment of $382,775 arrived at a rate base of $395,849,042. The Commission then added $15,899,118 to the rate base as an allowance for working capital to arrive at a total rate base of $411,718,160 (page 20 of the Commission's decision, which is in Appendix A, page 46 of our petition).

The Commission applied a rate of return of 6.25% to the rate base of $411,718,160 and determined that the Company was entitled to a return of $25,732,385 (page 24 of the Commission's decision, which is in Appendix A, page 53 of our petition). The Commission then determined that it was necessary to increase charges to residential and commercial consumers by $17,975,181 per year and that it was necessary to increase charges to industrial consumers by $955,468 in order to enable the Company to earn a return of $25,732,385 (pages 24-5 of the Commission's decision, which is in Appendix A, pages 53-5 of our petition).

ARGUMENT.

I.

A FEDERAL QUESTION HAS BEEN RAISED.

The Petitioners Have Been Denied Due Process of Law.

No amount of presenting evidence or of other effort upon the part of the Cities of Canton, Cleveland, and Massillon could ever contest a mute compilation of figures. No amount of evidence or other effort upon the part of Canton, Cleveland, and Massillon could ever determine the basis for the judgments inherent in the Hampton valuation. It is the testimony of the expert who prepares such a compilation that gives it concrete mass and cognitive form. It is only after the expert's direct testimony and cross-examination that a target is created, which can be exploded by rebuttal evidence and by brief.

If the Staff Reports of the Commission are valid evidence of property valuations and those who prepare them do not have either to give direct testimony or to be made available for cross-examination, then no Staff Report will ever be subject to impeachment. All such valuations would be perfect in the sense that, except for simple errors in arithmetic, no defect could ever be detected. Such a position would enable the Commission to justify any valuation or rate that it might choose. No valuation submitted by any party challenging a Staff Report could ever hope to attain a greater accuracy or validity than that which would be granted to the Staff Report. Under such circumstances no ratepayer could ever have a chance to protect himself against excessive valuations which result in excessive rates. Such a position would make the Commission's rate hearings into vacuous exercises for both the ratepaper and the utility.

This Court has determined that utilities are entitled to the protection of the Fourteenth Amendment to our Federal Constitution against arbitrary action on the part of the Commission in the valuation of utility property (*Ohio Bell Telephone Company v. Commission*, 301 U. S. 292). The Cities of Canton, Cleveland, and Massillon now seek the same protection for the ratepayer. *We seek equality of treatment.*

The Ratepayer Should Not be Required to Search the World for Commission Witnesses.

The Company has advanced the novel doctrine that the Cities of Canton, Cleveland, and Massillon were required under Ohio law to seek out and find Mr. Hampton, upon whom the respondents have so heavily relied but have never presented. Such a precept would be completely foreign to the nature of these adversary proceedings or, for that matter, to any system of legal procedure that we know of anywhere else in our country.

This Court has long held that whether state law actually deprives a party of his rights secured by the Constitution depends upon the law's practical application and effect (*Near v. Minnesota*, 283 U. S. 697, 708 (1931); *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237 (1917)). There is only one recognized way in which our right to cross-examine Mr. Hampton could have been satisfied: Counsel for the Commission should have offered Mr. Hampton for cross-examination at the Commission hearings.

The right of cross-examination is fundamental to a fair hearing. Without it any hearing is a farce. The Petitioners have been denied due process of law.

II.

THE CITIES ARE ENTITLED TO DUE PROCESS OF LAW.

As Representatives of the Ratepayer.

By some strange twist of logic both respondents argue that the ratepayer is not entitled to due process of law, since to give the ratepayer due process of law would somehow deny the utilities due process of law. The respondents then argue that the municipalities as representatives of the ratepayer are not entitled to claim due process of law.

The respondents attempt to justify their position by imagining a chamber of horrors where every one of the Company's 800,000 customers would leave his home, journey to Columbus, and demand one full day's hearing time, if he were entitled to due process of law. This is nonsense. The very best way to protect the ratepayer and to bypass the nightmares envisioned by the respondents is to permit the municipalities to represent their ratepayers. Such a procedure gives the ratepayer the best protection possible, since, normally, only the municipalities have the resources to effectively represent and protect his interests.

We Should Be Able to Protect Our Own Corporate Interests.

The respondents also argue that an Ohio utility corporation is entitled to the protection of the Fourteenth Amendment, while the ratepayer is not.

It is no secret to this Court that the various states have often been unfair to their great urban centers. It would be a terrible matter, if our cities, in their efforts to meet the pressing and perplexing problems of both the present and the future, were handicapped by being powerless to protect themselves against arbitrary state action.

III.

THE CITIES HAVE FOLLOWED RULE 23(F).

The Company has stated that the petitioners have failed to follow rule 23 (F) of this Court. The petitioners have shown on pages 4 through 5 of our petition that the ratepayer was denied due process of law by the Commission's adoption of the valuation attributed to Mr. Hampton in its "Findings and Order" of November 20, 1964. We showed on pages 9 through 11 of our petition that we made timely objections to the admission into evidence of the Hampton valuation (Tr. 9643-50). The Cities expounded at great length on their objections to the admission into evidence of the Hampton valuation.

The Cities of Canton, Cleveland, and Massillon, out of consideration for the Court's admonition that we be as brief as possible, fulfilled the remainder of the statements required by rule 23 (F) by noting on page 11 of our petition that we pointed out to the Commission this denial of due process of law in our "Petition of the Cities of Canton, Cleveland, and Massillon for Reopening, Rehearing, and Reconsideration" and that this error had been cited in our notice of appeal to the Supreme Court of Ohio. The Petitioners also stated that this error was argued at great length in our briefs before the Supreme Court of Ohio.

Errors 34, 35, 99, 100, and 102, which were listed on pages 7, 8 and 27, of the "Petition of the Cities of Canton, Cleveland, and Massillon, for Reopening, Rehearing, and Reconsideration" before the Commission, were as follows:

> "34. This Commission's rate base findings were predicated upon conclusions contained in the "Engineering Report" of the staff of this Commission which was purported to have been prepared by Mr. Hampton and other Commission employees, the precise identity of whom are unknown to the record, none of whom are either presented as witnesses or available for cross-examination."

"35. Through the acceptance by this Commission of the engineering valuations allegedly made by Mr. Hampton and others, who were not available for cross-examination, the Cities were denied both substantive and procedural due process of law."

"99. This Commission erred by failing to sustain the objections raised on pages 9643-50 of the record to the admission of Commission Exhibit 2-A. This Commission further erred by failing to sustain the motion to strike said exhibit made on page 11,668 of the record."

"100. This Commission erred by failing to sustain the objections raised on pages 9643-50 of the record to the admission of Commission Exhibit 2-B. This Commission further erred by failing to sustain the motion to strike said exhibit made on page 11,668 of the record."

"102. This Commission erred by failing to sustain the objections raised on pages 9643-50 of the record to the admission of Commission Exhibit 4. This Commission further erred by failing to sustain the motion to strike said exhibit made on page 11,668 of the record."

Errors 37, 38, 97, 98, and 100, contained on pages 14, 15, and 32 of the "Notice of Appeal by the Cities of Canton, Cleveland, and Massillon," before the Supreme Court of Ohio, are respectively almost identical to errors 34, 35, 99, 100, and 102 of our "Petition of the Cities of Canton, Cleveland, and Massillon for Reopening, Rehearing, and Reconsideration."

The subject matter of the above errors was discussed on pages 15 through 19 of our "Brief of the Cities of Canton, Cleveland, and Massillon" before the Supreme Court of Ohio. On pages 18-19 of our brief we argued:

"In reality the Cities were denied the right to cross-examine anyone about the valuation adopted by the

Commission. There is no real difference between making available witnesses who know nothing about the valuation in question and actually presenting no witnesses at all. In either event, the Cities were denied an opportunity to make an effective cross-examination. The Commission would not have acted any more arbitrarily if it had gone completely outside of the record to adopt some other valuation, as it did in *Ohio Bell Telephone Company v. P. U. C. O.*, 301 U. S. 292, 57 S. Ct. 724 (1937)."

"* * * The Commission's decision to adopt the valuation attributed to Mr. Hampton was arbitrary, capricious, and unlawful and was a denial to the Cities of due process of law under both the Constitution of Ohio and the Fourteenth Amendment to the Federal Constitution."

The conclusion to our reply brief before the Supreme Court of Ohio contained the following argument:

"There is no virtual difference between adopting a valuation predicated upon a valuation attributed to the phantom Hampton that is supposedly based in large part upon published trend factors which in turn are beyond any opportunity for impeachment as in the instant case and just taking administrative notice of other published trend factors after the case had been submitted as in the Bell case. Both procedures lack '* * * the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement * * *' (Tenth paragraph of the Syllabus of the *Bell* case)."

CONCLUSION.

The petitioners had no more opportunity to parry the Hampton valuation under the circumstances of this case than we would have had, if we had been told to parry the wind with a foil. Counsel for the Commission in this and other cases have openly contended on behalf of the Com-

mission that the ratepayer is not entitled to due process of law.

The Supreme Court of Ohio has closed its eyes to the problem of the ratepayer trying to receive the minimum of due process from the Commission. Indeed, the Supreme Court of Ohio seems also to have taken the position that the ratepayer is not entitled to due process of law, for it has ruled that "* * * the staff report does not need 'testimonial support' as the Cities contend." (Appendix C, page 66 of our petition.)

The plight of the Ohio ratepayer is a most desperate one. There is no hope for him under Ohio law.

WHEREFORE, the petitioners pray that a writ of certiorari directed to the Supreme Court of the State of Ohio may issue under the seal of this Honorable Court in this cause and that upon such review the judgment of the Supreme Court of Ohio, entered on March 23, 1966, and the "Findings and Order" of the Commission of November 20, 1964, be vacated, reversed, and set aside and that this case be remanded to the Supreme Court of Ohio with instructions to proceed in accordance with the rulings of this Court.

Respectfully submitted,

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